Wittgenstein, Dworkin and Rules

Maija Aalto-Heinilä, Joensuu, Finland

mjaalto@cc.joensuu.fi

1. Introduction

In legal theory, there exists a continuing controversy about the nature and status of legal rules. According to some theorists, law is essentially a matter of rules (see e.g. Hart 1994); whereas others claim that rules form only a part of law, or that rules are only a source of law but do not by themselves determine the outcomes of judges' decisions (see e.g. Tushnet 1983). From the point of view of Wittgenstein's remarks on rule-following, some concepttions about rules found in this debate look very strange. One example is Ronald Dworkin's famous separation of rules from legal principles. My aim in this paper is to point out, with the help of Wittgenstein, the oddness of Dworkin's definition of legal rules.

2. Dworkin's distinction between rules and principles

In his article "The Model of Rules I" (Dworkin 1977, pp. 14-45), Dworkin introduced a distinction that has become a commonplace in legal theory. He argues that a positivistic conception, according to which law is *just* a system of rules (which can be demarcated from other rule-systems by some formal criterion), is wrong. Dworkin claims that

> when lawyers reason or dispute about legal rights and obligations, [. . .] they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. [Positivism's] central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules. (Dworkin 1977, p. 22)

How do rules differ from principles (and other standards that are not rules)? According to Dworkin,

> The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. (Dworkin 1977, 24).

Thus, rules are something that, if they are valid, "dictate the result, come what may" (ibid., 35). Dworkin illustrates their nature by comparing them to the rules of a game. For example, in baseball it is a rule that if a batter has had three strikes, he is out. The referee of the game cannot consistently hold that this is an accurate rule of the game, and *at the same time* decide that some batter can have four strikes. Of course, there might occur some exceptional circumstances which allow a batter to have an extra strike; but according to Dworkin (and this is the feature that interests us in his account of rules), an accurate statement of the rule would take all exceptions to the rule into account. Any formulation of a rule that does not state all the exceptions would be "incomplete". In the same way, if it is a legal rule that a will is invalid unless signed by three witnesses,

> then it cannot be that a will has been signed by only two witnesses and is valid. The rule might have exceptions, but if it does then it is inaccurate and incomplete to state the rule so simply, without enumerating the exceptions. In theory, at least, the exceptions could all be listed, and the more of them that are, the more complete is the statement of the rule. (Dworkin 1977, 25)

Principles, on the other hand, do not dictate a particular result (even if they clearly are applicable to a given case). Sometimes a principle like 'No man may profit from his own wrong' can be the ground for decision (as in the famous case *Riggs vs. Palmer*, in which a grandson did not inherit his grandfather because he had murdered the latter), whereas in other cases a man may be allowed to profit from his own wrong (as e.g. in a case where one can enjoy the benefits of a new job even though one got it by breaching a contract with one's former employer). In short, a legal principle "states a reason that argues in one direction, but does not necessitate a particular decision" (Dworkin 1977, 26)

3. A Wittgensteinian critique

Dworkin's distinction between rules and principles, although enormously influential, has been criticised as well. The aim of the critics has mainly been to show that there is no reason why positivism couldn't include principles in their account of law. (See e.g. Hart 1994, 238-276) Yet legal theorists seem not to have paid attention to the astonishing idea, implicit in Dworkin's account, that there could be such a thing as a *complete expression of a rule*, which leaves absolutely no doubt about its correct application. What can Dworkin mean by such a thing?

A rule that would fulfil the theoretical requirement of completeness should have to be formulated in a language which is totally unambiguous: all the words used in the rule-formulation should have determinate, clear-cut meanings. Thus, there could not be any uncertainty about what e.g. 'signature' or 'witness' means. This means that the formulation of the rule should have to take into account all possible exceptional circumstances – situations in which, for example, a will is invalid even though signed by three witnesses (because one witness is e.g. drugged). As we saw, Dworkin indeed thinks that such a complete statement of a rule is possible.

Now as is well-known, Wittgenstein in his *Philosophical Investigations* reminds us that many of our concepts have no clear boundaries. A famous example is that of a game: if we look at all the various things that are called games, we find that there is nothing they all have in common, but see "a complicated network of similarities overlapping and criss-crossing" (PI 67). "The concept 'game' is a concept with blurred edges." (PI 71) However, this is not to say that we cannot *give* determinate meanings to our concepts – Wittgenstein admits that this is possible for particular purposes (see PI 69). But Dworkin seems to require from legal rules more than this; he seems not to want precision for some particular purpose only, but absolute precision. Wittgenstein tries to show *this* to be a confused requirement.

Let us look at Dworkin's example of an unambiguous legal rule, the one that states that a will is invalid unless signed by three witnesses. Here, it seems, we can lay down in advance what all the terms mean so that a judge can

demarcate valid wills from invalid ones, "come what may". But as H.L.A. Hart points out, even the most innocent-looking term of this rule, 'signature', can cause problems. What if the person who signs a will writes down only his initials? Or if he signs his name on the top of the first page and not on the bottom of the last page? Or if someone else guides his hand? Or if he uses a pseudonym? (Hart 1994, p.12) Dworkin would of course answer that a *complete* expression of the rule would take into account these cases; and if the present formulation does not do so, it has to be fixed accordingly. But would a complete expression of the rule also tell us what to do in cases where e.g. our laws of nature or our way of life changed radically (these changes are, after all, *theoretically* possible)? What counts as a signature if every time one touched a paper with a pen the paper would catch fire? Or if pens and papers disappeared from our culture altogether?

The point here is not to invent more and more bizarre circumstances after each new formulation of the rule, nor to point out some fundamental *defect* in human cognitive capacities (namely, the defect of not being able to know what the future will be like). The point is simply to remind us of the fact that

> It is only in normal cases that the use of the word is clearly prescribed; we know, we are in no doubt, what to say in this or that case. The more abnormal the case, the more doubtful it becomes what we are to say. And if things were quite different from what they actually are […] – this would make our normal language-games lose their point. (PI 142)

Thus, we could say that a rule such as 'A will is invalid unless signed by three witnesses' is complete if it fulfils its purpose in ordinary circumstances – in the everyday legal practice, with the users of the rule having received a similar legal training, with people in general behaving as they usually do, etc. (cf. PI 87) If things were quite different from what they are, we would not know how to apply this rule. This should not be understood as an empirical explanation of how rule-following is possible, but as a *grammatical* truth: it belongs to our *concept* of a rule that knowledge of its correct application presupposes ordinary circumstances. To want from rules *more* than this (which Dworkin seems to do) would, for Wittgenstein, to be a sign of having a confused conception of what rules are.

Perhaps Dworkin means, when he speaks of legal rules "dictating the result, come what may", that the way they are *intended* determines the correct application. Thus, it would be the *meaning* of the rule which makes it determinate (in opposition to an indeterminate legal principle). This explanation seems to come to us naturally - to use Wittgenstein's example, if someone applies a simple arithmetical rule "+2" correctly up until 1000, but after that writes down 1004, 1008, etc., we most probably would react by saying to this person. "No, I didn't mean that" or "Don't you see what I mean?" (see PI 185) It is tempting here to assume that if this person just saw into the mind of the rule-giver, he would know how to continue the series correctly. But then one must also assume that at the instant of giving the rule "+2", all the future applications are somehow present in that instant. As Wittgenstein puts it,

> your idea was that that act of meaning the order had in its own way already traversed all those steps: that when you meant it your mind as it were flew ahead and took all the steps before you physically arrived at this or that one. (PI 188)

Just such an idea seems to lie behind Dworkin's conception of legal rules. However, Wittgenstein continues by saying that "you have no model of this superlative fact, but you are seduced into using a super-expression. (It might be called a philosophical superlative.)" (PI 192) And I think that when Dworkin defines legal rules as something which can in principle anticipate all the exceptions to them (if the rules are completely expressed), he in fact has no clear model of what he wants. He is seduced into using a super-expression because he wants to make a rigid distinction between two different types of legal standards; and, perhaps, because he is misled by the *feeling* we often have when we follow simple (legal) rules. Wittgenstein admits that it often *strikes us* as if "the rule, once stamped with a particular meaning, trac[ed] the lines along which it is to be followed through the whole of space" (PI 219). This image (as Martin Stone has pointed out) can, of course, be used as stating an everyday feature of our rules: surely rule-following sometimes is like tracing a line that the rule has drawn through the whole of space. It is only if one takes this to be an *explanation* of how rule-following is possible, or as giving us the *essence* of rules (as distinct from other standards) that it falls apart. (See Stone 2004, 276) For if it is taken as an explanation, then not even a basic arithmetical order can fulfil its requirements: the order "add two" does not in an absolute sense determine just one way of applying it.

4. Conclusion

The upshot of the preceding discussion is that in so far as Dworkin implies that legal rules are *inherently*, i.e. on the basis of their inner nature, different from legal principles, then the distinction between rules and principles is not sustainable. The idea of rules as absolutely determinate standards which dictate a result in all circumstances is just a "philosophical superlative" of which we have no actual model. However, if one wants to make a distinction between different types of legal standards by pointing out that they have different *uses* in the legal practice, this can justify the distinction. And, to be fair to Dworkin, he also uses this criteria in his separation of rules from principles; as we saw at the beginning of the paper, he talks e.g. of lawyers' making "*use* of standards that do not *function* as rules, but *operate* differently as principles…" (Dworkin 1977, 22, e.a.) The functional difference between rules and principles that Dworkin describes seems to boil down to this: if a judge refuses to apply a standard to a given case, and the rest of the legal community thinks that this is *wrong*, that the judge *should* have applied this standard, that it is *always* applied in cases like this, then the standard in question can be called a rule. If a judge can ignore a standard without this reaction, then it is a principle. My purpose here has not been to deny that such a distinction is possible; the purpose has only been to show, with the help of Wittgenstein, that if one turns this practical distinction into a *metaphysical* one, the result is just confusion. And I think that Dworkin's way of characterising legal rules invites this confusion.

Literature

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